contracted with entities who have acquired such rights. These water rights in some instances authorize large water diversions from major navigable waterways, and in other cases authorize diversions from small, local, non-navigable waterways. The *amici* believe that state and local laws are proper for regulating non-navigable waters, like many wetlands, that do not significantly affect navigable waterways. The Army Corps of Engineers, in administering its section 404 permit program, has assumed jurisdiction over all non-navigable waters that have any hydrologic connection to navigable waters, regardless of whether such waters have any significant effect on interstate commerce in navigable waters. The Corps' exercise of such jurisdiction effectively limits the traditional authority of state and local governments to regulate water use and land use, unlawfully encroaches on the states' sovereign rights, and potentially impairs the rights of those, like many *amici* here, who rely on state and local laws for their water supplies. In the *amici*'s views, the Clean Water Act does not authorize federal jurisdiction over non-navigable waters that do not significantly affect interstate commerce in navigable waters, such as the wetlands here.

SUMMARY OF ARGUMENT

These cases raise the question whether federal jurisdiction under the Clean Water Act (CWA) applies to non-navigable waters, including wetlands, that are not directly adjacent to navigable waters. The CWA authorizes federal jurisdiction over "navigable waters," defined as "waters of the United States." In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (*"SWANCC"*), 531 U.S. 159 (2001), this Court held that these definitional terms include navigable waters, and also non-navigable waters that have a "significant nexus" to navigable waters; therefore, they do not include "isolated" wetlands that are not "adjacent" to navigable waters and have no connection

to them. *SWANCC* held that Congress intended only to assert the federal government's "traditional jurisdiction" over navigable waters, or waters that could be made navigable. 531 U.S. at 172. Under *SWANCC*, the CWA does not apply to non-navigable waters, including wetlands, that are connected remotely but not directly to navigable waters, because such waters do not have a "significant" nexus to such waters. Hence, under *SWANCC*, federal jurisdiction does not extend to the wetlands in these cases.

The history of the federal navigation power, as developed by this Court's jurisprudence, demonstrates that the CWA does not authorize federal jurisdiction over non-navigable waters that do not significantly affect interstate commerce in navigable waters. This Court has held that the federal navigation power – which derives from the commerce power – authorizes regulation not only of navigable waters, but also of non-navigable waters that significantly affect navigation or interstate commerce in navigable waterways, or at least that significantly affect their flows or conditions. The Court has not, however, expanded the federal navigation power beyond these limits, and has instead recognized the authority of state and local governments to regulate water use and land use for all other purposes.

In enacting the CWA, Congress patterned federal jurisdiction on the navigation power and thus maintained the historic balance between federal sovereign authority and state and local authority. Congress explicitly authorized federal jurisdiction over "navigable waters," and thus directly invoked the navigation power as the basis of jurisdiction. Congress defined this term more amorphously as "waters of the United States," to ensure that federal jurisdiction is not strictly limited to navigation and navigable waters *per se*, but instead extends to non-navigable waters in circumstances where the navigation power has been applied – and, as noted above, this Court has recognized that the navigation power applies to non-navigable

waters that significantly affect interstate commerce in navigable waters, or at least that significantly affect their flows or conditions. Therefore, the CWA does not authorize federal regulation of non-navigable waters, like the wetlands here, that do not significantly affect navigation or interstate commerce in, or the flows or conditions of, navigable waters. The CWA, like the navigation power itself, protects the national interest in navigable waterways while otherwise recognizing the primacy of state and local laws to regulate water and land use.

Since federal jurisdiction under the CWA is based on the navigation power, which in turn defines the federal commerce interest in navigable waters, no constitutional question arises here concerning whether Congress overstepped its bounds in authorizing federal regulation beyond the limits of the navigation and commerce power. Under the Sixth Circuit's interpretation, however, a constitutional question would arise because its decisions would extend federal jurisdiction beyond the limits of the federal navigation and commerce power. The Commerce Clause does not authorize federal regulation of non-navigable waters that do not seriously implicate navigation or commerce interests in navigable waters. Therefore, the Sixth Circuit's interpretation would render the CWA unconstitutional as applied here.

ARGUMENT

I. THIS COURT'S DECISION IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. U. S. ARMY CORPS OF ENGINEERS* INDICATES THAT THE CLEAN WATER ACT DOES NOT APPLY TO NON-NAVIGABLE WATERS, SUCH AS THE WETLANDS HERE, THAT LACK A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS.

The Clean Water Act (CWA) establishes two major permit programs in furtherance of its goal of controlling

water pollution. First, section 402 establishes the National Pollutant Discharge Elimination System (NPDES), which prohibits the "discharge of any pollutant" without an NPDES permit. 33 U.S.C. §§ 1342, 1311(a). The phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). Second, section 404 prohibits the discharge of dredged or fill materials into "navigable waters" without a permit issued by the Army Corps of Engineers ("Corps"). *Id.* at § 1344. Thus, both permit programs apply to "navigable waters." The term "navigable waters" is defined as "waters of the United States." *Id.* at § 1362(7). The question presented here is whether these permit programs apply to the non-navigable wetlands in these cases. Although these cases involve the Corps' section 404 permit program, the question whether federal jurisdiction extends to non-navigable wetlands applies to the section 402 NPDES permit program as well.

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001), this Court held that the Corps' section 404 program does not apply to wetlands "isolated" from – that is, having no connection to – navigable waters. Although the Court was not called on to decide the question raised here – whether the CWA applies to wetlands hydrologically-connected but not immediately adjacent to navigable waters[2] – its analysis suggests that the CWA does not apply to such wetlands. The Court held that the phrase "waters of the United States" includes both navigable waters and waters that have a "significant nexus" to navigable waters. 531 U.S. at 167. According to the Court,

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[2] Although the wetlands in *Carabell* were separated by a berm from an adjacent ditch that eventually flowed into a navigable lake, we will not address whether the berm severs the jurisdictional connection between the wetlands and the lake, and instead will assume for the sake of discussion that the wetlands were hydrologically connected to the lake.

Congress intended to assert its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172, *citing United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940). The Court noted that the Corps' original regulations, adopted two years after enactment of the CWA, limited the Corps' jurisdiction to its traditional authority to regulate navigable waters. 531 U.S. at 168; 33 C.F.R. § 209.120(d)(1). The Court rejected the Corps' argument that "waters of the United States" include all waters found anywhere in the United States regardless of their navigability, stating that Congress apparently did not intend to "exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3. "[I]t is one thing," the Court stated, "to give a word [navigable] limited effect and quite another to give it no effect whatever." *Id.* at 172.

Since *SWANCC* held that the CWA does not authorize federal regulation of "isolated" wetlands, the Court declined to reach the constitutional question whether Congress might have exceeded its commerce powers in authorizing such regulation. Nonetheless, the Court's statutory analysis was substantially driven by its constitutional concerns. The Court stated that the application of the CWA to "isolated" wetlands would result in a "significant impingement of the States' traditional and primary authority over land and water use," and that Congress presumptively would not have "significantly changed the federal-state balance" unless it "clearly" so provided. 531 U.S. at 173, 174. The Court noted that it had recently ruled in other cases that Congress' commerce power, "though broad, is not unlimited." *Id.* at 173, *citing United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995). Because of these constitutional concerns, the Court declined to grant deference to the Corps' regulation under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 531 U.S. at 172.

The *SWANCC* Court distinguished its earlier decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which, the Court stated, had held that the Corps' jurisdiction under section 404 extends to wetlands that are "adjacent" to and "actually abutted" navigable waters. 531 U.S. at 167. That decision, the Court stated, does not apply where, as in *SWANCC*, the wetlands lack any "significant nexus" to navigable waters. *Id.* Thus, *SWANCC* and *Riverside Bayview*, taken together, hold that the Corps' jurisdiction under section 404 extends to wetlands that have a "significant nexus" to – that is, are "adjacent" to – navigable waters, but not wetlands lacking this nexus.

In *Rapanos*, the Sixth Circuit held that the wetlands were "waters of the United States" because there was a "hydrologic connection" between them and navigable waters, in that the wetlands eventually drained into navigable waters. Pet. App. A13-A17, A20-A29. In *Carabell*, the Sixth Circuit held that the wetlands were "waters of the United States" because there was a hydrological connection between them and a navigable lake, even though a berm separated the wetlands from a tributary that flowed into the lake. *Carabell, et al. v. Army Corps of Engineers*, 391 F.3d 704, 710 (2004).

In fact, the wetlands in these cases did not have a "significant nexus" to navigable waters because they were not adjacent to navigable waters; did not significantly affect navigation or interstate commerce in such waters; and had no apparent, significant effects on the actual flows or condition of such waters. In *Rapanos*, the wetlands intermittently drained into a manmade ditch that emptied into a non-navigable creek that eventually reached a tributary that flowed into a navigable bay, which was located a substantial distance from the wetlands. Pet. App. B9-B12. In *Carabell*, the wetlands were separated by a berm from an adjacent ditch, which emptied

into a drainage, which emptied into a creek, which emptied into a navigable lake. *Carabell*, 391 F.3d at 705-706. Thus, the connection between the wetlands and navigable waters in both cases was highly attenuated, and the distance between them substantial, and there was no "significant nexus" between them. Under *SWANCC*, the "nexus" must not only exist but must also be "significant." The nexus is not "significant" if the wetlands do not significantly affect navigation or commerce in, or the flows or condition of, navigable waters, even though there may be a bare, tenuous connection between them.[3]

SWANCC held that a "significant nexus" exists if the wetland is "adjacent" to navigable waters. 531 U.S. at 167. Thus, the test under *SWANCC* is one of proximity and contiguity, not eventual connection. The Corps' regulations define "adjacent" as "bordering, contiguous or neighboring." 33 C.F.R. § 328(c). The wetlands in these cases – although adjacent to small waterbodies that eventually connected to navigable waters – were not themselves adjacent to navigable waters. Hence, like the wetlands in *SWANCC*, they did not have a "significant nexus" to navigable waters and did not significantly affect navigation or interstate commerce.

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[3] The notion that a highly attenuated hydrologic connection to navigable waters subjects wetlands or other non-navigable waters to federal jurisdiction is particularly confounding in Alaska, since many of the wetlands or waters that may be subject to public or private development are often located many miles from a navigable water body, or the waters that emanate from them have no significant impact on the flow or condition of the navigable water body. For example, areas of Alaska, such as the North Slope and the Yukon-Kuskokwim Delta, consist of vast, wet or frozen – but arguably hydrologically-interconnected – tundra complexes spanning hundreds of miles in every direction. Under the Sixth Circuit analysis, wetlands located tens, or even hundreds, of miles from the nearest navigable water body would be subject to federal jurisdiction.

The Sixth Circuit made no inquiry into the substantiality of any nexus between the wetlands and navigable waters, in terms of whether the wetlands significantly affected interstate commerce in, or the flows or condition of, the navigable waters. Under the lower court's analysis, federal jurisdiction attaches if even a minor amount of water – a trickle – makes its way from the wetland to the navigable waters. The Sixth Circuit decisions are not consistent with *SWANCC*, which held that federal jurisdiction depends on whether a "significant nexus" exists. No such nexus exists here.

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS BASED FEDERAL JURISDICTION ON THE FEDERAL NAVIGATION POWER, WHICH AUTHORIZES REGULATION OF NON-NAVIGABLE WATERS THAT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE IN NAVIGABLE WATERS.

In enacting the CWA, Congress based federal jurisdiction on the federal government's traditional authority to regulate navigable waters, which includes authority to regulate non-navigable waters that significantly affect navigation or interstate commerce in the navigable artery. The wetlands in these cases do not fall within the scope of the traditional navigation power, and thus are beyond federal jurisdiction under the CWA.

A. The Federal Navigation Power and State Water Rights Authority

After the American Revolution, the English Crown and Parliament's sovereign control of waters – including navigable waters and underlying beds – was transferred to the original thirteen states. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *United States v. Texas*, 339 U.S. 707, 717 (1950); *United States v. Oregon*,

295 U.S. 1, 14 (1935); *Shively v. Bowlby*, 142 U.S. 1, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842). "[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered to the general government." *Martin*, 41 U.S. at 410. The states hold their navigable waters in trust for the public, for the protection of navigation, commerce and fisheries. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). When new states joined the Union, they were admitted on the same terms as – that is, on an "equal footing" with – the original thirteen states, and thus acquired the same sovereign control of their waters. *Corvallis*, 429 U.S. at 372-374; *Texas*, 339 U.S. at 717; *Shively*, 142 U.S. at 49-50.

When the states formed the nation, the Constitution they prepared and ratified delegated substantial powers to the federal government, including the power, contained in the Commerce Clause, art. I, § 8, cl. 3, to regulate commerce among the states. *Gibbons v. Ogden*, 22 U.S. 1, 189-190 (1824); *United States v. Lopez*, 514 U.S. 549, 552-553 (1995). The federal commerce power includes the power to regulate navigable waters in order to ensure their continued navigability; navigable waters are among the "natural highways" of interstate commerce and hence are the "public property of the nation." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899) ("highways"); *Gilman v. Philadelphia*, 70 U.S. 713, 724-725 (1866) ("public property"); *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-427 (1940). "For these purposes [of protecting navigation and navigable capacity], Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England." *United States v. Chandler-Dunbar Water Power*

Co., 229 U.S. 53, 63 (1913). The federal navigation power limits the states' historic water rights authority by precluding them from granting rights that impair water navigability. *Rio Grande Dam*, 174 U.S. at 703. The federal navigation power is a "servitude" that allows the federal government to protect navigable waters without always having to pay compensation to those whose rights are impaired. *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979); *United States v. Twin City Power Co.*, 350 U.S. 222 (1955); *Chandler-Dunbar*, 229 U.S. 53.

In its landmark decision in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), this Court held that certain congressional enactments – the Desert Land Act of 1877 and the Mining Acts of 1866 and 1870 – "severed" the water on the public lands from the lands themselves; as a result of the "severance," the states regulate and control the use of water, while the federal government owns and controls the public lands. 295 U.S. at 158, 162-164. The states' control of water, however, is subject to the federal government's paramount authority to "secure the uninterrupted navigability of all navigable streams within the limits of the United States," and to regulate water "as might be necessary for the beneficial use of the government property." *Id.* at 159. Otherwise, the states have full control of all waters within their jurisdiction, including "plenary control" of all non-navigable waters. *Id.* at 163-164.

Thus, while the federal government has authority to regulate navigable waters and reserve water for use on federal lands,[4] the states possess authority under "equal

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[4] Under the Constitution's Property Clause, art. IV, § 3, cl. 2, Congress has authority to reserve water for use on federal reserved lands, and impliedly exercises this authority for the "primary" purposes of reserved lands. *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).

footing" and "severance" principles to regulate the use of water, both navigable and non-navigable, for all other purposes. *California v. United States*, 438 U.S. 645, 657-658 (1978); *Nevada v. United States*, 463 U.S. 110, 123-124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937); *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704-706 (1899). In regulating water, the states allocate water among different consumptive uses – urban, agricultural and industrial – and also allocate water for environmental purposes, such as for protection of fish and wildlife, recreation, and scenic beauty. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983); *United States v. State Water Res. Cont. Bd.*, 182 Cal.App.3d 82, 227 Cal.Rptr. 161 (1986). Although much major water development takes place because of diversions from the great navigable rivers, like the Colorado and the Columbia, much local development depends on diversions by small communities and agricultural areas from small, local waterways, like streams and canals. In *California v. United States*, written by then-Associate Justice William Rehnquist, this Court summarized the relationship between federal and state authority to regulate water:

> [E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.

438 U.S. at 662, *quoting from Rio Grande Dam*, 174 U.S. at 705.

In regulating land use, local governments often balance the need for residential and commercial development that will provide housing and promote economic growth, and the competing need to protect environmental resources, including wetlands, that may be affected by development. In balancing these needs, local governments may approve development projects because the public

benefits outweigh the environmental harm (although they may impose conditions to avoid or mitigate the harm), or instead they may disapprove the projects because the environmental costs are unacceptably high; these decisions are typically made at the local level. *See, e.g.*, California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000 *et seq.*; *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 (1972); *Santiago County Water Dist. v. County of Orange*, 118 Cal.App.3d 818, 173 Cal.Rptr. 602 (1981) (local government approval of development project affecting wetlands). In our federal system, state and local laws generally define property, including the right to use both land and water; the impacts of property uses on wetlands and other resources are considered by local governments in deciding whether to grant the property right or attach conditions to it. *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944); *cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). This Court has recognized that regulation of land use is "'a function traditionally performed by local governments.'" *SWANCC*, 531 U.S. at 174, *quoting from Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

B. Expansion of the Federal Navigation Power

As the nation's industry expanded and its commerce developed, Congress has expanded its regulation of navigable waterways. The Rivers and Harbors Act of 1899 (RHA) prohibits any "obstruction" to the "navigable capacity of any of the waters of the United States" without congressional approval (§ 10); prohibits erection of certain structures, like dams and bridges, in any "navigable water" without Corps approval (§ 9); and prohibits the deposit of any "refuse matter" into a "navigable water" except as authorized by the Corps (§ 13). 33 U.S.C. §§ 401,

403, 407. The RHA was enacted in response to this Court's decision in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888), which had held that no federal common law bars "obstructions and nuisances" in navigable waters. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). "The true intent of the Act of Congress [RHA] was that unreasonable obstructions to navigation and navigable capacity were to be prohibited. . . ." *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929). Additionally, Congress enacted various flood control measures, such as the Flood Control Act of 1944, 58 Stat. 887 (1944), which authorize the Corps to build flood control projects to protect the navigability of the nation's waterways. The 1944 act contains a savings clause protecting the states' water rights authority; the congressional policy is "to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." *Id.* at 888.[8]

This Court has held that Congress' expansive exercise of its navigation powers is within the scope of its commerce authority, and that the navigation power is not

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[8] Acting under its navigation powers, Congress has created federal programs to develop the nation's navigable waterways for purposes unrelated to protection of navigation. The Federal Power Act of 1935, 16 U.S.C. §§ 791 *et seq.*, authorizes federal regulation of hydroelectric power development. *First-Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946). The Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, authorizes federal water projects to reclaim the arid lands of the western states. *California v. United States*, 438 U.S. 645 (1978); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950). This Court has upheld Congress' authority under the navigation power to adopt these water development programs, even though they are not strictly related to navigation. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (hydropower development); *Federal Power Comm'n v. Union Elec. Co.*, 381 U.S. 90 (1965) (same); *cf. Gerlach*, 339 U.S. at 742-750 (upholding reclamation program under spending power).

strictly limited to protecting navigation in navigable waters *per se*. The navigation power applies not only to actually-navigable waters, but also to waters "susceptible" of navigation, that is, capable of supporting navigation by physical improvements. *United States v. Appalachian Elec. Power. Co.*, 311 U.S. 377, 406 (1940); *The Daniel Ball*, 77 U.S. 557, 563 (1870); *see* 33 C.F.R. § 329.4 (1978). The navigation power authorizes federal regulation of navigable waters for purposes unrelated to navigation, such as for production of hydroelectric power; thus, once the waters are deemed navigable, the federal interest extends beyond navigation. *Appalachian Power*, 311 U.S. at 406-420; *United States v. Grand River Dam Auth.*, 363 U.S. 229, 232-233 (1960); *see* note 5, *supra*. The navigation power applies to all the nation's navigable waters, including those located wholly within a single state. *Utah v. United States*, 403 U.S. 9, 10 (1971). The navigation power authorizes regulation of deposits of materials, like industrial solids, into navigable waters, because such deposits impair the condition of the waters to support interstate commerce and thus are an "obstruction" to "navigable capacity." *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

More importantly here, this Court has held that the federal navigation power is not strictly confined to navigable waters, but instead extends to non-navigable waters that significantly affect navigation or interstate commerce in the navigable artery. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899); *United States v. Grand River Dam Auth.*, 363 U.S. 229 (1960); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portion." *Atkinson*, 313 U.S. at 523. Since the purpose of the federal navigation power is to protect navigable waters that are the highways of interstate commerce, this federal power necessarily

extends to non-navigable waters that directly influence the capacity of navigable waters to bear such commerce.

In the seminal case of *Rio Grande Dam*, this Court enjoined a private party from building a dam over a non-navigable tributary of the Rio Grande in New Mexico, even though the dam was authorized under local law, because the dam threatened to "destroy" the navigability of the Rio Grande itself. 174 U.S. at 706, 707, 708. According to the Court, although Congress' desert land and mining laws granted broad authority to the states to administer their water rights systems, Congress did not grant authority to "destroy" the navigability of rivers by allowing obstructive structures, like navigation-destroying dams, to be placed in the tributaries. *Id.* at 704-705. As the Court noted, the Rivers and Harbors Act of 1890, 26 Stat. 454, the predecessor of the RHA of 1899, prohibited structures that impaired the navigable capacity of the nation's navigable waterways. *Id.* at 707. The Court stated:

> Although this power of changing the common law rule [of riparian rights] as to streams within its dominion, undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

Id. at 703.

In *Atkinson*, this Court rejected an attempt by the Governor of Oklahoma to enjoin construction of a federal flood control project on the Red River in Oklahoma, which was a non-navigable tributary of the Mississippi River.

The Court stated that the federal project was part of a "comprehensive flood-control program for the Mississippi itself," and Congress has authority to create flood control projects in non-navigable waterways in order to "protect[] the nation's arteries of commerce through control of the watersheds." 313 U.S. at 525-526, 529.

In *Grand River*, this Court, following *Rio Grande Dam* and *Atkinson*, upheld Congress' authority to create a flood control project on the Grand River in Oklahoma, a non-navigable tributary of the Arkansas River. The Court stated that Congress has authority "to 'treat the watersheds as a key to flood control on navigable streams and their tributaries.'" 363 U.S. at 232, *quoting from Atkinson*, 313 U.S. at 525.

Although the Court in these cases broadened the federal navigation power to include certain non-navigable waters, the Court did not sanction a wholesale federal intrusion into the traditional authority of state and local governments to regulate water use and land use. The non-navigable waters subject to federal regulation in these cases had major impacts on navigation or interstate commerce; they were capable of supporting major flood control projects, as in *Atkinson* and *Grand River*, or their obstruction would have "destroyed" navigability in the main artery, as in *Rio Grande Dam*. In *Atkinson* and *Grand River*, the Court emphasized that Congress' authority to regulate the "watersheds" was necessary to provide for flood control and ensure navigability of the main artery. *Atkinson*, 313 U.S. at 529; *Grand River*, 363 U.S. at 232. Thus, these cases authorize federal regulation of non-navigable waters that significantly affect navigation or interstate commerce, but otherwise preserve the authority of state and local governments to regulate water, navigable and non-navigable, for all other purposes. This Court in other contexts has balanced federal and state interests in determining the scope of federal authority to regulate

water, *see United States v. New Mexico*, 438 U.S. 696 (1978) (holding that federal reserved water rights apply to "primary" reservation uses but not "secondary" uses), and the Court has done the same in the context of the federal navigation power. As this Court stated in *California Oregon Power*, the states have "plenary control" of non-navigable waters except where significant federal navigation issues arise. 295 U.S. at 163-164. Therefore, the federal navigation power, as developed by this Court's jurisprudence, does not extend to intrastate, non-navigable bodies of water that do not significantly affect navigation or commerce interests, such as the wetlands here.

C. Enactment of Clean Water Act

In enacting the CWA in 1972, Congress was fully aware of this Court's decisions defining the federal navigation power, and based federal jurisdiction under the CWA on the navigation power. Under the CWA, federal jurisdiction for the section 402 NPDES program and the Corps' section 404 program applies to "navigable waters." 33 U.S.C. §§ 1344, 1362(12). Thus, the CWA directly invokes the navigation power as the basis for federal jurisdiction under both programs. The term "navigable waters" is defined as "waters of the United States." *Id.* at § 1362(7). The latter phrase, although undefined and somewhat amorphous, extends federal jurisdiction to the limits of the navigation power as defined in this Court's decisions – and, as noted above, this Court has extended the navigation power to non-navigable waters that significantly affect navigation or interstate commerce in navigable waters. *See, e.g., Rio Grande Dam*, 174 U.S. 690. Thus, the anchor of federal jurisdiction under the CWA is the navigation power, albeit broadly defined. The CWA's jurisdictional provisions cannot be read in isolation, devoid of the larger history surrounding the navigation power. Under

this construction, federal jurisdiction under the CWA applies, first, to navigable waters, and, second, to non-navigable waters that significantly affect the navigable artery, such as by affecting navigation or interstate commerce in the artery, or by significantly affecting its flows or condition.

Notably, the CWA's broader jurisdictional phrase – "waters of the United States" – does not provide a separate, independent basis of federal jurisdiction, but instead defines the more limited term – "navigable waters" – that establishes the basis of federal jurisdiction. Thus, "waters of the United States" does not, and cannot, fundamentally change the meaning of the term it defines, "navigable waters." "[I]t is one thing to give a word [navigable] limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172.

If Congress had intended to expand federal jurisdiction beyond the traditional limits of the navigation power, Congress presumably would have expressed its intent with unmistakable clarity, because that would have caused a major rearrangement of the traditional balance of federal and state power. The CWA evinces no clear congressional intent to rearrange the federal-state balance. On the contrary, the CWA, by grounding federal jurisdiction on the navigation power, maintains the traditional balance between federal navigation authority and state and local authority to regulate land and water use.

The legislative history of the CWA supports this analysis. According to the House Conference Committee report:

> The new and broader definition [of federal jurisdiction] is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case [citation omitted] – to include waterways which would be "susceptible of being

> used ... with reasonable improvement,".... United States v. Appalachian Electric Power Co., 331 U.S. 377, 407-410, 416 (1940) [other citations omitted.] [¶] [T]here is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." Utah v. United States, 403 U.S. 9, 11 (1971) [other citations omitted.]

HOUSE CONSIDERATION OF REPORT OF CONFERENCE COMMITTEE, *compiled in* 1 LEGISLATIVE HISTORY OF WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Ser. No. 93-1, 93d Cong., 1st Sess. 250-251 (1973) (statement of Rep. Dingell). Thus, Congress intended that federal jurisdiction under the CWA would extend to the limits of the navigation power as broadly defined by this Court's recent decisions, and that federal jurisdiction would apply if the waterway serves as a "link in the chain of commerce among the States," irrespective of whether the waters are strictly "navigable," as held in *Appalachian Power*, 311 U.S. 377, or whether they are wholly intrastate, as held in *Utah v. United States*, 403 U.S. 9 (1971).

SWANCC and *Riverside Bayview* also support this analysis. *SWANCC* held that Congress intended to assert its "traditional jurisdiction" over navigable waters and its "commerce power over navigation." 531 U.S. at 172, 168 n.3. As *SWANCC* noted, the Corps' original regulations limited its jurisdiction to its traditional regulatory authority over navigable waters. 531 U.S. at 168. *SWANCC*

concluded that federal jurisdiction applies only to waters that are navigable or have a "significant nexus" to them. *Id.* at 167. In *Riverside Bayview*, the Court held that the CWA does not confine federal regulation to "navigable waters" under the "classical understanding of that term," 474 U.S. at 133, thus indicating that federal jurisdiction extends beyond strictly navigable waters to waters that fall within the navigation power. Read together, *SWANCC* and *Riverside Bayview* state the rule that the CWA authorizes federal regulation of non-navigable waters that have a "significant nexus" to navigable waters, but not non-navigable waters lacking this nexus.

The CWA contains other provisions, in addition to the "navigable waters" limitation, indicating that Congress intended to preserve the historic federal-state balance. Section 101(b) declares that the states have the "primary responsibilities and rights" to control water pollution, and to "plan the development and use . . . of land and water resources, . . . " 33 U.S.C. § 1251(b). Section 510 declares that the CWA is not to be construed as "impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States," and does not preclude the states from adopting standards, limitations or requirements relating to water quality not "less stringent" than federal standards. *Id.* at § 1370. Section 401(a) provides that an applicant for a federal license or permit that would authorize a discharge into "navigable waters" must obtain a permit from the affected state that the discharge complies with the state's water quality requirements. *Id.* at § 1341(a); *see PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994).

Perhaps more importantly, section 101(g) declares that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by" the Act. 33 U.S.C.

§ 1251(g). This provision expressly preserves the states' traditional authority to regulate water, as such authority has been recognized by this Court in *California Oregon Power, California v. United States, Nevada v. United States, Gerlach*, and other cases.[6]

The Sixth Circuit decisions below are not consistent with the limitations of federal jurisdiction under the CWA, as based on the navigation power. The decisions would expand federal jurisdiction to include non-navigable wetlands that have no significant nexus to navigable waters and no substantial relationship to navigation or interstate commerce. As the *SWANCC* Court recognized

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[6] Senator Malcolm Wallop, who sponsored section 101(g), stated in the legislative history that the provision ensures that the CWA does not abridge state water rights authority except in cases involving "incidental" effects. 123 Cong. Rec. 39212 (1977) ("the purpose of this amendment [is] to insure that State allocation systems are not subverted," but "[t]he requirements of section 402 and 404 permits may incidentally affect individual water rights," and "[i]t is not the purpose of this amendment to prohibit those incidental effects.") In *Jefferson County*, 511 U.S. 700, this Court cited Senator Wallop's statement in concluding that section 401(a) of the CWA – which, as noted above, requires that federal licenses or permits are consistent with state water quality requirements – applied in that case because its effect on state water rights laws was "incidental." 511 U.S. at 721. Since section 401(a) requires deference to state water quality laws, the provision does not overtly conflict with the objective of section 101(g), which requires deference to state water rights laws.

In *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), this Court stated that section 101(g) might exempt western water projects from compliance with CWA requirements in cases involving interbasin water transfers – although the Court did not decide the question – because such compliance might "raise the costs of water distribution prohibitively" and thus impair section 101(g)'s purpose. 541 U.S. at 108. In our view, section 101(g) was intended to preserve the states' sovereign authority to regulate water, not simply protect them from the potentially-prohibitive "costs" of compliance with CWA requirements, and therefore section 101(g)'s applicability should not depend on whether the compliance "costs" are "prohibitive."

with respect to the Corps' regulation in that case, the Sixth Circuit decisions would result in a "significant impingement" on the states' traditional authority to regulate land and water use. *SWANCC*, 531 U.S. at 173, 174. Such impingement is not permissible in the absence of a clear congressional expression, which is not found in the CWA.

III. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESSIONAL REGULATION OF NON-NAVIGABLE WATERS THAT DO NOT SIGNIFICANTLY AFFECT NAVIGATION OR INTERSTATE COMMERCE.

The Constitution's Commerce Clause, art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce . . . among the several States." This Court has held that the federal commerce power authorizes congressional regulation of (1) the "channels" of interstate commerce, (2) the "instrumentalities" of interstate commerce, and (3) "activities" that "substantially affect" interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 559 (1995). The CWA regulates the "channels" of interstate commerce because it applies to "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7). The CWA is the successor of the RHA of 1899, which regulated "obstructions" and "refuse" deposits in "navigable waters" that are considered channels of interstate commerce. 33 U.S.C. §§ 403, 407; *see Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929).[7]

[7] To be sure, the CWA also regulates *activities* affecting the channels, in that it prohibits unpermitted "discharges" of pollutants into "waters of the United States." 33 U.S.C. § 1311(a). Such activities, however, are incidental to the CWA's main purpose of regulating the channels. *See id.* at § 1251(a) ("objective" of CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's

(Continued on following page)

This Court has held that Congress' authority to regulate the "channels" of interstate commerce – where the "channels" are navigable waterways – does not depend strictly on whether navigation or navigable waters are involved, but instead depends on whether the regulated activity substantially, and actually, affects interstate commerce in navigable waters. "In truth the authority of the United States is the regulation of commerce on its waters." *Appalachian Power*, 311 U.S. at 426-427. "The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are . . . best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 173-174 (1979).

Nonetheless, this Court has analyzed the federal commerce power as applied to water regulation in the context of the navigation power – that is, whether the waters are navigable, or, if they are not, whether they affect interstate commerce in navigable waters, or at least significantly affect the flows or condition of navigable waters. Thus, the constitutional focus is not on navigation or navigability *per se*, but instead on whether the regulated waters support interstate commerce or significantly affect the capacity of waters to bear such commerce. In *Appalachian Power*, this Court held that Congress has authority under its commerce powers to regulate hydropower

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waters"). Thus, the CWA's focus is on the channels of interstate commerce rather than activities affecting such commerce, unlike the federal statutes in *Morrison*, *Lopez*, and *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), which regulated various forms of conduct unrelated to interstate commerce channels.

production in navigable waters – even though hydropower production is not related to navigation – because the waters in that case were in fact navigable or "susceptible" of navigation, a factual issue the Court reviewed and decided *de novo*. 311 U.S. at 406-420. In *Rio Grande Dam, Grand River* and *Atkinson*, this Court held that the federal commerce power authorizes federal regulation of non-navigable tributaries to the extent the tributaries affect the capacity of the navigable arteries to support interstate commerce. In *California v. United States*, this Court stated that the states have "total control" over their "internal waters" except where the "navigation servitude" or reserved rights are involved, 438 U.S. at 662, which means that the federal commerce power in the context of water regulation depends on whether the navigation servitude applies, which in turn depends on whether the waters are navigable or otherwise significantly affect interstate commerce in navigable waters. In *SWANCC*, this Court stated that constitutional concerns would arise if the CWA were construed as applying to wetlands that lack a "significant nexus" to navigable waters, thus suggesting the constitutional necessity of a significant link between the regulated waters and navigable waters. 531 U.S. at 173-174.

The overarching theme of these cases is that the federal commerce power, as applied to non-navigable waters, depends on whether such waters have a *substantial* relationship with navigable waters, in that they directly affect or influence the capacity of navigable waters to support interstate commerce, or at least significantly affect the flows or condition of navigable waters – which are the same factors that apply in determining the applicability of the navigation power. "The navigation servitude . . . gives rise to an authority in the Government to assure that such [navigable] streams retain their capacity to

serve as continuous highways for the purpose of navigation in interstate commerce." *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). If, for example, someone discharges pollutants into a local pond that is connected to a navigable waterway, and the pollutants reach the navigable waterway and substantially degrade its water quality, the federal navigation power – and the commerce power on which it is based – authorize regulation of the discharge; as noted earlier, the deposit of industrial solids into navigable waters is an "obstruction" to "navigable capacity" and hence subject to federal regulation. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). If, instead, the pollutants do not cause substantial degradation of water quality in the navigable waterway, then there is no "obstruction" to "navigable capacity" and the pond has only local impacts and is subject to local regulation.[8]

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[8] In terms of the "commerce" interest necessary to sustain congressional regulation under the Commerce Clause, this Court has held that "commerce" denotes "economic" activity of an interstate nature. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 561; *see Gonzales v. Raich*, 125 S.Ct. 2195, 2211 (2005) (marijuana use on national basis involves "quintessentially economic" activities relating to the "production, distribution and consumption of commodities" for which there was an interstate market). Wetlands do not involve "economic" interests except in a highly attenuated sense, and this Court in *Lopez* and *Morrison* held that a "tenuous" and "attenuated" economic connection is not sufficient to sustain congressional commerce regulation. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 612. This Court has sometimes aggregated otherwise-local economic "activities" in sustaining congressional commerce regulation. *Raich*, 125 S.Ct. at 2207-2208, 2211; *Wickard v. Filburn*, 317 U.S. 111, 127-129 (1942). In *Lopez* and *Morrison*, however, this Court expressed its reluctance to aggregate essentially non-economic activity. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611 n.4, 613, 617. Moreover, this Court has never aggregated, as a basis for federal commerce regulation, non-navigable, local waterways that do not significantly affect interstate commerce, and that have been traditionally regulated by state and local governments. In our view, the aggregation principle should not be applied where its effect would be to substantially rearrange the federal-state balance.

In our view, this case raises no constitutional question concerning whether Congress exceeded its powers in authorizing federal jurisdiction under the CWA. As the *SWANCC* Court held, such federal jurisdiction authorizes regulation of navigable waters, and also non-navigable waters having a "significant nexus" to them. 531 U.S. at 172. Thus, the CWA provides an accommodation of federal and state authority that is consistent with, and indeed based on, this Court's interpretation of the navigation power. This is not a case, as in *Raich*, *Lopez* and *Morrison*, where Congress clearly overrode state laws and the question was whether Congress had overstepped its constitutional bounds. Here, Congress anchored federal jurisdiction on the traditional navigation power and evinced no intent to otherwise override state and local laws regulating water and land use.

The Sixth Circuit's interpretation of federal jurisdiction does raise constitutional issues, however, because its interpretation would expand such jurisdiction beyond the limits of the traditional federal navigation power – and hence beyond the limits of the commerce power. Under the Sixth Circuit's interpretation, federal jurisdiction presumably would extend to virtually every body of water in the nation – every brook and pond, every dry wash – that has any connection with navigable waters, no matter how remote the connection or how inconsequential or non-existent its effect on navigation or interstate commerce. This Court has never held or suggested that federal jurisdiction over the nation's waterways extends this far, and its navigable waters decisions clearly indicate it does not. The Sixth Circuit's expansive interpretation of federal jurisdiction would, in the words of the *SWANCC* decision, allow "federal encroachment upon a traditional state power." 531 U.S. at 174. The Commerce Clause does not allow this encroachment.

CONCLUSION

The CWA authorizes federal jurisdiction up to the limits of the navigation power but not beyond. Thus, the statute authorizes federal regulation of navigable waters, and of non-navigable waters that significantly affect navigation or commerce interests in navigable waters. The wetlands in these cases do not fall into these categories and are beyond the scope of federal regulation under the CWA. Therefore, the Sixth Circuit's decisions should be reversed.

Respectfully submitted,

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v.

UNITED STATES OF AMERICA,

Respondents,

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus Curiae American Farm Bureau Federation will address the following question:

Whether the plain language of the Clean Water Act limits the reach of the Section 404 permitting scheme to waters that are, were, or could be made navigable in fact and wetlands that actually abut such waters.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICUS CURIAE 1

FACTUAL SUMMARY 3

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. BY THE PLAINEST OF LANGUAGE, THE CLEAN WATER ACT LIMITS THE CORPS' SECTION 404 JURISDICTION TO WATERS THAT ARE NAVIGABLE 6

A. "Navigable Waters" Are Waters That Are, Have Been, Or Could Be Made Navigable In Fact 7

B. Congress Did Not Expand The Scope Of The Act By Defining "Navigable Waters" As "Waters Of The United States" 7

C. The CWA's Legislative History Does Not Expand The Plain Meaning Of The Act's Jurisdictional Terms 10

D. Contemporaneous Regulatory Interpretations Correctly Determined The Scope Of The CWA 11

E. The Isolated Wetlands In *Carabell* And Wetlands That Drain To Non-Navigable Ditches In *Rapanos* Are Beyond The Scope Of Section 404 13

TABLE OF CONTENTS-Continued

Page

II. ESTABLISHED RULES OF STATUTORY CONSTRUCTION CONFIRM THAT THE CWA REACHES ONLY WATERS THAT ARE, HAVE BEEN, OR COULD BE MADE NAVIGABLE IN FACT 14

A. The CWA Explicitly Preserves Local Power Over Land And Water Use 14

1. The Corps' "any physical connection" approach improperly overrides State and local authority that Congress sought to preserve 15

2. The Corps' "any physical connection" approach is unnecessary to achieve wetlands protection 17

3. Congress has ample power to protect non-navigable waters and wetlands when it so chooses 20

B. The Rule Of Lenity Prohibits The Corps' Assertion Of Jurisdiction Over All Waters And Wetlands With Any Physical Connection To Navigable Waters 22

1. The CWA sets forth a scheme of harsh criminal and civil penalties 23

2. Criminal statutes like the CWA are subject to the rule of lenity, which requires that they be narrowly construed 24

3. The Corps' theory of jurisdiction leaves citizens in considerable doubt whether their actions are criminal 26

TABLE OF CONTENTS-Continued

Page

CONCLUSION 29

TABLE OF AUTHORITIES

Cases: **Page**

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)..... 16

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)..... 14

Bell v. *United States*, 349 U.S. 81, 83 (1955)..... 24

Borden Ranch Partnership v. *U.S. Army Corps of Engineers*, 537 U.S. 99 (2002)..... 1, 2

Cannon v. *University of Chicago*, 441 U.S. 677 (1979)..... 8

City of Edmonds v. *Oxford House*, 514 U.S. 725 (1995)..... 15

Clark v. *Martinez*, 125 S. Ct. 716 (2005)..... 25

Commissioner v. *Acker*, 361 U.S. 87 (1959)..... 26

Commissioner of Natural Res. v. *S. Volpe & Co., Inc.*, 206 N.E.2d 666 (Mass. 1965)..... 19

Crandon v. *United States*, 494 U.S. 152 (1990)..... 26

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871)..... 7, 8

Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989)..... 8

Dolan v. *City of Tigard*, 512 U.S. 374 (1994)..... 15

Donnelly v. *United States*, 228 U.S. 243 (1913)..... 7

Exxon Mobil Corp. v. *Allapattah Servs.*, 125 S. Ct. 2611 (2005)..... 11

FERC v. *Mississippi*, 456 U.S. 742 (1982)..... 15

Gregory v. *Ashcroft*, 501 U.S. 452 (1991)..... 15

TABLE OF AUTHORITIES-Continued

Page

Gromer v. *Standard Dredging Co.*, 224 U.S. 362 (1912) 8

Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974) 9

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 5

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 16

Leocal v. *Ashcroft*, 125 S. Ct. 377 (2004) 25, 26

Leovy v. *United States*, 177 U.S. 621 (1900) 8

M. Kraus & Bros., Inc. v. *United States*, 327 U.S. 614 (1946) 28

McDermott Int'l, Inc. v. *Wilander*, 498 U.S. 337 (1991) 8

McNally v. *United States*, 483 U.S. 350 (1987) 24

Midlantic Nat'l Bank v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494 (1986) 8

Mills v. *United States*, 36 F.3d 1052 (11th Cir. 1994) 23

The Montello, 78 U.S. (11 Wall.) 411 (1870) 8

New York v. *United States*, 505 U.S. 144 (1992) 16

Newdunn Assocs. v. *U.S. Army Corps of Engineers*, 541 U.S. 972 (2004) 1

North Shore Boom Co. v. *Nicomen Boom Co.*, 212 U.S. 406 (1909) 8

TABLE OF AUTHORITIES-Continued

Page

NRDC v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975) 12

Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) 5, 9

Pasquantino v. *United States*, 125 S. Ct. 1766 (2005) 24

Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 14

Perry v. *Haines*, 191 U.S. 17 (1903) 8

Petition of June and Keith Carabell, 1998 WL 710423 (Mich. Dep't Natural Res. Sept. 30, 1998) 3, 4

Pierce County v. *Guillen*, 537 U.S. 129 (2003) 5

Railroad Co. v. *Maryland*, 88 U.S. (21 Wall.) 456 (1874) 7

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 10

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 14

Rewis v. *United States*, 401 U.S. 808 (1971) 24, 25

Salinas v. *United States*, 522 U.S. 52 (1997) 14

Scheidler v. *NOW, Inc.*, 537 U.S. 393 (2003) 24

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ..... *passim*

South Florida Water Management District v. *Miccosukee Tribe*, 541 U.S. 95 (2004) 1

TABLE OF AUTHORITIES-Continued

Page

United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) 7

United States v. *Bass*, 404 U.S. 336 (1971) 14, 24, 25, 26, 28

United States v. *Borowski*, 977 F.2d 27 (1st Cir. 1992) 25

United States v. *Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001) 27

United States v. *Cardiff*, 344 U.S. 174 (1952) 24

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 27

United States v. *Eidson*, 108 F.3d 1336 (11th Cir. 1997) 23

United States v. *Hopkins*, 53 F.3d 533 (2d Cir. 1995) 23

United States v. *Lopez*, 514 U.S. 549 (1995) 5

United States v. *Ortiz*, 427 F.3d 1278 (10th Cir. 2005) 23

United States v. *Phillips*, 367 F.3d 846 (9th Cir. 2004) 23

United States v. *Plaza Health Labs*, 3 F.3d 643 (2d Cir. 1993) 25

United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, *Rapanos* v. *United States*, 124 S. Ct. 1875 (2004) 3, 4

TABLE OF AUTHORITIES-Continued

Page

United States v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) 13

United States v. *Rueth Dev. Co.*, 189 F. Supp. 2d 874 (N.D. Ind. 2001), *aff'd*, 335 F.3d 598 (7th Cir. 2003) 27

United States v. *Sinskey*, 119 F.3d 712 (8th Cir. 1997) 23

United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) 25

Utah v. *United States*, 403 U.S. 9 (1971) 7, 11

United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) 24

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 23

United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) 22

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 14

Constitutions, Statutes, Ordinances, and Regulations:

U.S. CONST. art. 1, § 8 21

16 U.S.C. § 797(e) 9

16 U.S.C. § 817 9

16 U.S.C. § 1301 21

16 U.S.C. § 1451 21

TABLE OF AUTHORITIES-Continued

Page

16 U.S.C. § 1604 22
16 U.S.C. § 3821 21
16 U.S.C. § 3831 21
16 U.S.C. § 3837 21
16 U.S.C. § 4401 21
16 U.S.C. § 4408 21
16 U.S.C. § 4702(16) 8
23 U.S.C. § 133 21
33 U.S.C. § 1251(b) 15, 18
33 U.S.C. § 1311(a) 6
33 U.S.C. § 1319(c) 23
33 U.S.C. § 1319(d) 23
33 U.S.C. § 1319(g) 23
33 U.S.C. § 1344 26
33 U.S.C. § 1344(a) 6, 10
33 U.S.C. § 1344(g) 10, 18
33 U.S.C. § 1362(7) 6, 26
33 U.S.C. § 1362(12) 6
33 U.S.C. § 1370 15
43 U.S.C. § 1701 22
Flood Control Act of 1936, 49 Stat. 1570 9
Rivers and Harbors Act § 10, 30 Stat. 1121 (1899) 8

TABLE OF AUTHORITIES-Continued

Page

33 C.F.R. § 209.120(d)(1) (1974) 11
33 C.F.R. § 209.260(e)(1) (1974) 12
33 C.F.R. § 320.4(a) 3, 17
33 C.F.R. § 320.4(j) 17
33 C.F.R. § 323.2(e) 16
33 C.F.R. § 323.2(f) 17
33 C.F.R. § 328.3(a) 12, 13
33 C.F.R. § 329.4 12
33 C.F.R. § 329.5 12
33 C.F.R. § 329.6 12
33 C.F.R. § 329.11(a) 13
33 C.F.R. § 329.11(b) 12
40 C.F.R. § 233.70 18
ARIZ. ADMIN. CODE § R18-11-101(22) 20
ARIZ. ADMIN. CODE § R18-11-101(30) 20
FLA. STAT. ANN. § 369.305 20
FLA. STAT. ANN. § 373.41492 20
FLA. STAT. ANN. § 373.4595 20
IND. CODE ANN. § 13-18-22 19
MD. CODE ANN., ENVIR. § 5-901 20
MICH. CONST. art. IV, § 52 18
Inland Lakes and Streams Act of 1972, MICH. COMP. LAWS § 324.30101 *et seq.* 18